

## REMARKS

After entry of this Amendment, the pending claims are: claims 1, 5, 9, 10 and 12-18. The Office Action dated August 17, 2009 has been carefully considered. Claims 2-4, 7 and 11 have been canceled. Claims 6, 8, 19 and 20 were previously canceled. Claims 1, 5, 9, 12 and 13 have been amended. Claims 5, 9, 12 and 13 have been amended to correct grammatical errors, issues relating to claim dependency, antecedent basis errors and to distinctly point out the claimed invention of the present application. Support for the amendments to claim 1 can be found throughout the Specification and Drawings and specifically in paragraph Nos. 10 and 29 and Fig. No. 1. Accordingly, no new matter has been added. Reconsideration and allowance of the pending claims in view of the above Amendments and the following remarks is respectfully requested.

In the Office Action dated August 17, 2009, the Examiner:

- objected to claims 1-18 for containing one or more informalities;
- rejected claims 1-18 under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claims the subject matter which Applicants regard as the invention;
- rejected claims 1-12 under 35 U.S.C. 103(a) as being unpatentable over Canadian Patent No. 2,332,822 to Frigg ("Frigg") in view of U.S. Published Patent Application No. 2003/0233145 to Landry *et al.* ("Landry"); and
- rejected claims 13-18 under 35 U.S.C. 103(a) as being unpatentable over Frigg in view of Landry in view of U.S. Published Patent Application No. 2002/0052656 to Michelson.

## CLAIM OBJECTIONS

Claims 1 and 13 were objected to for containing one or more informalities. Specifically,

independent claim 1 was objected to for lacking antecedent basis for “the base plate”, “the cover plate” and “the two sections”. Applicants respectfully submit that independent claim 1 has been amended to recite, *inter alia*, “[a]n intervertebral implant comprising a central axis, an upper section, suitable for laying onto a base plate of a vertebral body lying above, and a lower section suitable for laying onto a cover plate of a vertebral body lying below, wherein: the upper section ... the lower section ... and a frame shaped, central joint section located between the upper and lower sections ...” As such these objections are believed to be overcome. Withdrawal of these objections is respectfully requested.

Dependent claim 13 was objected to for reciting “comprises” instead of “comprise”. Applicants respectfully submit that claim 13 has been amended to recite “comprise”. As such this objection is believed to be overcome. Withdrawal of this objection is respectfully requested.

### **35 U.S.C. 112 REJECTION**

Independent claim 1 was rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicants regard as the invention. Specifically, independent claim 1 was rejected for using “axle” instead of “axis”. Applicants respectfully submit appropriate correction has been made to independent claim 1, as amended. Accordingly, this rejection is moot. Withdrawal of this rejection is respectfully requested.

### **INDEPENDENT CLAIM 1**

Independent claim 1 and claims 2-12, which are dependent therefrom, have been rejected as being unpatentable over Frigg in view of Landry. Dependent claims 13-18 have been rejected as being unpatentable over Frigg in view of Landry in view of Michelson. With respect to claims 2-4, 6-8 and

11, which have been canceled, these rejections are moot. Applicants respectfully traverses these rejection with respect to claims 1, 5, 9, 10 and 12-18, as amended.

As amended, independent claim 1 is directed to an intervertebral implant comprising a central axis, an upper section, suitable for laying onto a base plate of a vertebral body lying above, and a lower section suitable for laying onto a cover plate of a vertebral body lying below, and recites, *inter alia*, as follows:

the upper section has ... a bottom surface and a first projection extending from the bottom surface, the first projection including a first drill hole ... the lower section has ... a top surface and second and third projections extending from the top surface, the second and third projections including second and third drill holes ... and a frame shaped, central joint section located between the upper and lower sections so that the upper section is moveable with respect to the lower section, the central joint section including a central bore and first, second, third and fourth drill holes, the first projection extending from the bottom surface of the upper section being receivable within the central bore formed in the central joint section, the central joint section being receivable between the second and third projections extending from the top surface of the lower section so that a first axle is receivable in the first and second drill holes formed in the central joint section and the first drill hole formed in the first projection, a second axle is receivable in the third drill hole formed in the central joint section and the second drill hole formed in the second projection and a third axle is receivable in the fourth drill hole formed in the central joint section and the third drill hole formed in the third projection ...

Applicants respectfully submit that there is no disclosure, teaching, or suggestion in either Frigg or Landry, either alone or in combination, of an intervertebral implant including an upper section, a lower section and a frame shaped, central joint section wherein the upper section includes a first projection extending from a bottom surface thereof and the lower section includes second and third projections extending from a top surface thereof and the frame shaped, central joint section includes a central bore for receiving the first projection extending from the bottom surface of the upper section and wherein the frame shaped, central joint section is receivable between the second and third projections

extending from the top surface of the lower section.

Moreover, Applicants respectfully submit that there is no disclosure, teaching, or suggestion in either Frigg or Landry, either alone or in combination, of first, second and third axles wherein the first axle is receivable in first and second drill holes formed in the central joint section and a first drill hole formed in the first projection, the second axle is receivable in a third drill hole formed in the central joint section and a second drill hole formed in the second projection and the third axle is receivable in a fourth drill hole formed in the central joint section and a third drill hole formed in the third projection.

Therefore, Applicants respectfully submit that amended claim 1 is allowable over Frigg and Landry for at least these reasons. Withdrawal of this rejection and allowance of amended claim 1 is respectfully requested.

Furthermore, as claims 5, 9, 10 and 12-18 all depend from independent claim 1, it is submitted that these claims are equally allowable. Withdrawal of these rejections and allowance of claims 5, 9, 10 and 12-18 is also respectfully requested.

With respect to claims 13-18 which were rejected under 35 U.S.C. 103(a) as being unpatentable over Frigg in view of Landry and in further view of Michelson, it is respectfully submitted that Michelson does not overcome the short comings of Frigg and Landry. Michelson was cited for the proposition that it would be obvious to incorporate at least two holes in the upper and lower section for receiving bone fixation devices. Without addressing the merits of this argument and/or the combination, it is respectfully submitted that, for at least the above-identified reasons, neither Frigg, Landry nor Michelson, either alone or in combination, disclose, teach or suggest all of the limitations of dependent claims 13-18 and, specifically, the above-listed features of claim 1. Thus, it is respectfully submitted

that dependent claims 13-18 are allowable over Frigg, Landry and Michelson. Withdrawal of this rejection and allowance of dependent claims 13-18 is respectfully requested.

### CONCLUSION

Based upon the above-listed amendments and remarks, Applicants respectfully submit that the present application, including claims 1, 5, 9, 10 and 12-18, is in condition for allowance and such action is respectfully requested.

No fee is believed due for this submission. If, however, the Commissioner determines otherwise, the Commissioner is authorized to charge any fees which may now or hereafter be due in this application to Deposit Account No. 19-4709.

In the event that there are any questions, or should additional information be required, please contact Applicant's attorney at the number listed below.

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Respectfully submitted,

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